Supreme Court, U.S.
FILED
FEB 5 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2010

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, *et al.*,
Petitioners,

v.

CHARLES GOODMAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR PETITIONERS

BERNARD KLEIMAN
One East Wacker Drive
Chicago, Illinois 60601

CARL FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

ROBERT M. WEINBERG
JULIA PENNY CLARK
MICHAEL H. GOTTESMAN *
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

LAURENCE GOLD
DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether a labor union may be held to have violated Title VII of the Civil Rights Act of 1964 or 42 U.S.C. § 1981 solely because the union failed to make affirmative efforts to stop an employer's discrimination.

2. Whether, if a duty to make such efforts exists under Title VII or Section 1981, a union can be held liable for breach of that duty because in filing grievances against the employer's alleged discriminatory actions, it made the arguments (such as seniority) that it thought best calculated to win the grievances, but those arguments did not include an explicit allegation of race discrimination.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	3
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
A. Overview	4
B. The Facts and the District Court's Findings Relevant to Union Liability	6
C. The District Court's Theory of Union Liability	18
D. The Court of Appeals' Decision	19
ARGUMENT	20
Introduction and Summary	20
I. TITLE VII DOES NOT PLACE UPON UNIONS AN AFFIRMATIVE DUTY TO COMBAT EMPLOYER DISCRIMINATION	25
A. The Words of the Statute Create No Such Affirmative Duty	25
B. Any Such Affirmative Duty Would Be Inconsistent With the National Labor Policy	34
II. SECTION 1981 DOES NOT PLACE UPON UNIONS AN AFFIRMATIVE DUTY TO COMBAT EMPLOYER DISCRIMINATION	45
CONCLUSION	48

TABLE OF AUTHORITIES

Cases	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	30
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	36, 41, 44
Babrocky v. Jewel Food Co., 773 F.2d 857 (7th Cir. 1985)	35
Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981)	38, 40
Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984)	34
Carey v. Greyhound Bus Co., 500 F.2d 1372 (5th Cir. 1974)	34
Commonwealth of Pennsylvania v. Operating Engineers Local 542, Nos. 85-1540 and 85-1706 (3rd Cir., Dec. 5, 1986)	20
Del Costello v. Teamsters, 462 U.S. 151 (1963)	38, 40
Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978), *cert. denied*, 459 U.S. 844 (1982)	34
EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977)	35
Electrical Workers v. Foust, 442 U.S. 42 (1979)	43
Electrical Workers v. Hechler, No. 85-1360 (argued January 20, 1987)	42
Electrical Workers v. Labor Board, 341 U.S. 694 (1951)	30
Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975)	44
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)	43
Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)	30
Freeman v. Teamsters Local 135, 746 F.2d 1316 (7th Cir. 1984)	40
General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982)	25, 28, 36, 45-48
Glasser v. NLRB, 395 F.2d 401 (2d Cir. 1968)	31

TABLE OF AUTHORITIES—Continued

Page

Golden State Transit Co. v. Los Angeles, —— U.S. ——, 106 S. Ct. 1395 (1986) 37
H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970) 37
Haynie v. Ross Gear Division of TRW, Inc., 799 F.2d 237 (6th Cir. 1986) 36
Hodgson v. Baltimore Regional Joint Board, 462 F.2d 180 (4th Cir. 1972), *aff'g, Hodgson v. Sagner, Inc.*, 326 F. Supp. 371 (D.Md. 1971) 34
Howard v. International Molders Union, 779 F.2d 1546 (11th Cir.), *cert. denied*, 106 S.Ct. 2902 (1986) 35
Humphrey v. Moore, 375 U.S. 335 (1964) 38, 39
Machinists v. Gonzales, 356 U.S. 617 (1958) 30
Macklin v. Spector Motor Freight Systems, Inc., 156 U.S. App. D.C. 69, 478 F.2d 979 (1973) 33, 44
McDonald v. Santa Fe Transp. Co., 427 U.S. 273 (1976) 28
Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985) 39
Murphy v. Miller Brewing Co., 307 F. Supp. 829 (E.D. Wis. 1969), *aff'd on appeal of other issues*, 457 F.2d 221 (7th Cir. 1972) 34
NLRB v. Insurance Agents, 361 U.S. 477 (1960) 37
NLRB v. Jarka Corp., 198 F.2d 618 (3rd Cir. 1952) 31
Newspaper & Mail Deliverers' Union of New York & Vicinity (Herald-Tribune), 93 N.L.R.B. 419 (1951) 31
Patterson v. American Tobacco Co., 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976) 34
Philbrook v. Ansonia Bd. of Ed., 757 F.2d 476 (2d Cir. 1985), *remanded on other grounds*, 107 S.Ct. 367 (1986) 35
Radio Officers v. Labor Board, 347 U.S. 17 (1954) 30
Randall v. Loftsgaarden, —— U.S. ——, 106 S.Ct. 3143 (1986) 31
Romero v. Union Pacific R.R., 615 F.2d 1303 (10th Cir. 1980) 34

TABLE OF AUTHORITIES—Continued

	Page
Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984)	39
Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960)	40
TWA v. Hardison, 432 U.S. 63 (1977)	44
Teamsters v. United States, 431 U.S. 324 (1977)	26
Teamsters Union v. Oliver, 358 U.S. 283 (1959)	37, 42
Terrell v. United States Pipe & Foundry Co., 644 F.2d 1112 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955 (1982)	33
T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959)	31
United States v. James, —— U.S. ——, 106 S.Ct. 3116 (1986)	25
Vaca v. Sipes, 386 U.S. 171 (1967)	38
Western Addition Community Org. v. NLRB, 158 U.S. App. D.C. 138, 485 F.2d 917 (1973), *rev'd*, 420 U.S. 50 (1975)	44
Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974)	35

Statutes and Regulations

Civil Rights Act of 1866, 42 U.S.C. § 1981	*passim*
Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*	
Section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1)	26
Section 703(a)(2), 42 U.S.C. § 2000e-2(a)(2)	26
Section 703(c), 42 U.S.C. § 2000e-2(c)	3, 25
Section 703(c)(1), 42 U.S.C. § 2000e-2(c)(1)	19, 26
Section 703(c)(2), 42 U.S.C. § 2000e-2(c)(2)	26
Section 703(c)(3), 42 U.S.C. § 2000e-2(c)(3)	*passim*
Section 706(a), 42 U.S.C. § 2000e-5(a)	45
Section 706(f)(3), 42 U.S.C. § 2000e-5(f)(3)	3
Section 706(g), 42 U.S.C. § 2000e-5(g)	30

TABLE OF AUTHORITIES—Continued

Page

Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* 39
Equal Pay Act of 1963, Pub. L. 88-38, 77 Stat. 56 31
29 U.S.C. § 206(d)(2) 32, 33
Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* 39
Labor Management Relations Act of 1947 29
National Labor Relations Act, 29 U.S.C. § 151 *et seq.* 29
Section 8(a)(3), 29 U.S.C. § 158(a)(3) 29
Section 8(b)(2), 29 U.S.C. § 158(b)(2) 23, 29-31
Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* 39
28 U.S.C. § 1343(a)(3) 3
29 C.F.R. § 800.106 33

Legislative History

109 Cong. Rec. 9207 (1963) 32
109 Cong. Rec. 9209 (1963) 32, 33
110 Cong. Rec. 5863-64 (1964) 26
110 Cong. Rec. 7205-06 (1964) 28
110 Cong. Rec. 7207 (1964) 26
110 Cong. Rec. 7218 (1964) 27
110 Cong. Rec. 7477 (1964) 27
110 Cong. Rec. 7482 (1964) 28
Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 405 and Similar Bills, 88th Cong., 1st Sess. 5 (1963) 32
H.R. 405, 88th Cong., 1st Sess. (1963) 31

Miscellaneous

Black's Law Dictionary (Revised Fourth Ed., 1968) 27
Larson, Employment Discrimination (1983) 28
Schmidt, *Title VII: Coverage and Comments*, 7 B.C. Indus. & Com. L. Rev. 459 (1966) 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-2010

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, *et al.*,
Petitioners,

v.

CHARLES GOODMAN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR PETITIONERS

This brief is the joint product of the petitioners, United Steelworkers of America, AFL-CIO-CLC, and its Local Unions 1165 and 2295 (referred to herein collectively as "the unions") and the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"). The AFL-CIO shares with the petitioners a belief that the lower courts in this case erred in their interpretation of Title VII of the Civil Rights Act of 1964 and of 42 U.S.C. § 1981, and that the interpretation adopted by the lower courts, if generally followed, would undermine the national labor policy as consistently de-

fined by this Court. The decision of petitioners and the AFL-CIO to file a single brief reflects the identity of their views on the legal issues presented and their desire to minimize the burden on the Court by stating their common position only once.

OPINIONS BELOW

The opinion of the court of appeals is reported at 777 F.2d 113.[1] It is reproduced in the Appendix to the petition as Appendix A (Pet. App. 1a-49a).[2] The district court's findings of fact and conclusions of law are reported at 580 F. Supp. 1114. They are reproduced in the Appendix to the petition for certiorari as Appendix B (Pet. App. 50a-148a). The permanent injunction issued by the district court is unreported. It is reproduced in the Appendix to the petition as Appendix E (Pet. App. 155a-159a).

---

[1] In addition to the parties identified in the caption, Lukens Steel Company was a defendant in the district court and an appellant in the court of appeals. Lukens filed a separate petition for certiorari on other issues. *Lukens Steel Co. v. Goodman, et al.*, No. 85-1645. At the request of the parties, the Court entered an order on November 17, 1986, deferring consideration of Lukens' petition due to a proposed settlement between Lukens and the plaintiffs, which had been presented to the district court for approval pursuant to Federal Rule of Civil Procedure 23(e). That settlement was approved by the district court on January 22, 1986. Subject only to a possible appeal from that order by class members objecting to the settlement, Lukens Steel Company will not be a party to further proceedings in this case.

[2] This case has been consolidated for purposes of argument with No. 85-1626, *Goodman, et al. v. Lukens Steel Company, et al.*, which raises only issues pertaining to the statute of limitations. This brief's citations to the petition appendix ("Pet. App.") all refer to the appendix filed with the petition for certiorari in No. 85-2010. A separate petition appendix was filed with the petition in No. 85-1626; it is not cited in this brief. A single consolidated Joint Appendix is being filed for both cases. It consists of two volumes, and is cited in this brief as "JA."

JURISDICTION

The district court issued a permanent injunction against the unions (Pet. App. 155a-159a). On appeal from that injunction, the court of appeals affirmed in major part (Pet. App. 3a, 34a). The court of appeals' judgment was entered on November 13, 1985 (Pet. App. 160a-161a). Timely petitions for rehearing were denied on January 7, 1986 (Pet. App. 162a-167a). By order of Justice Brennan dated March 18, 1986, the time for petitioners to file their petition for certiorari was extended to and including June 6, 1986 (Pet. App. 170a). The petition was filed on June 6, 1986, and the writ of certiorari was granted December 1, 1986. The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) and 42 U.S.C. § 2000e-5(f)(3). This court has jurisdiction to review the judgment below under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 703(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(c), provides:

> It shall be an unlawful employment practice for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 1 of the Civil Rights Act of 1866, re-enacted with modifications as Section 16 of the Civil Rights Enforcement Act of 1870, 42 U.S.C. § 1981, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

A. Overview

This is a class action raising claims of employment discrimination in violation of Title VII of the Civil Rights Act of 1964 and of 42 U.S.C. § 1981. The defendants below were Lukens Steel Company ("Lukens" or "the company"), a manufacturer of specialty steels with its main facility in Coatesville, Pennsylvania, and the unions that are the exclusive bargaining representatives for all hourly-paid employees at the Coatesville plant.[3] Those unions are the petitioners here. The plaintiffs, who are respondents in this Court, are seven black employees and former employees of Lukens, and an organization known as the United Political Action Committee of Chester County. The individual plaintiffs were certified by the district court to represent an "across-the-board" class and were allowed to challenge a broad range of employment practices. (*Id.* 16a, 56a). The case was tried to the district court without a jury in 1980.

Plaintiffs asserted only three class-wide claims against the unions: that the seniority system had been negotiated

---

[3] The International Union is formally certified as the exclusive bargaining representative. The two local unions act as its agents in performing certain representational functions at the local level. (Pet. App. 132a.)

and maintained for a racially discriminatory purpose; that the unions had discriminated against black employees in the processing of grievances; and that the unions had "passively permit[ted] the employer to discriminate against black persons" and had "[f]ail[ed] to act affirmatively to cause the employer to refrain from discriminating against black employees because of their race and color." (I JA 7.) The plaintiffs also alleged that the unions had committed individual acts of discrimination against three of the seven named plaintiffs.

When the district court rendered its decision, the only discrimination that it found was discrimination committed by the company. The district court found no discrimination committed by the unions, either against the class or against individual plaintiffs. The district court held that no discriminatory motive had entered into the negotiation or maintenance of the seniority system. (Pet. App. 70a-71a, 133a.) The court held that plaintiffs had failed to prove any pattern of discrimination by the unions in processing the grievances of black employees. (*Id.* 135a-137a.) The court also rejected all of the individual plaintiffs' claims of discrimination by the unions. (*Id.* 147a-148a.)

The district court nonetheless concluded that the unions had violated both Title VII and § 1981. Its ruling was based entirely on plaintiffs' claim that the unions had "passively permit[ted]" Lukens to discriminate. Indeed, its ruling was even narrower. The district court did not find that the unions had generally failed to oppose Lukens' discriminatory practices; the unions' liability was based solely on a finding of "repeated failures . . . to include racial discrimination as a basis for grievances or other complaints against the company." (*Id.* 137a.) Moreover, the district court did not find that the unions' failure to make express arguments of racial discrimination in grievances was based on a discriminatory motive. On the contrary, the district court credited union officials' testimony that such arguments were unneces-

sary when the grievance could be soundly based on other grounds, and that injecting racial issues tended to interfere with successful resolution of individual employees' grievances. (*Id.* 138a.) The district court concluded, however, that these reasons for not making express arguments of discrimination were "unacceptable" because, in the court's view, grievances filed on other grounds were not equally effective as a means of inducing the employer to change its discriminatory "attitudes." (*Id.*)

On this theory, the district court found the unions liable for their "reluctan[ce]" to make express arguments of race discrimination in grievances generally. (*Id.*) The court also gave, as examples of the unions' failure to make discrimination arguments in grievances, the unions' approach to three particular employer practices that the court had found unlawful. First, with regard to Lukens' use of written tests as a selection device for certain transfers and promotions, the court found that although the unions had objected to the company's testing practices, the grievances that the unions filed did not specifically allege that the tests had a disparate impact on black employees. (*Id.* 137a-138a.) Second, the court found that the unions had failed to file grievances challenging discriminatory discharges of black employees during their probationary periods because of a policy of not filing grievances for probationary employees for any reason. (*Id.* 137a.) And, third, the court found that the unions had failed to file grievances asserting a particular theory of contract violation—a theory that was contrary to the understanding of the parties to the contract—as a means to challenge Lukens' discriminatory initial assignment practices. (*Id.* 138a-139a).

B. The Facts and the District Court's Findings Relevant to Union Liability

1. *The Unions' Reluctance to Assert Explicit Claims of Racial Discrimination in Grievances Generally.* Throughout the period relevant to this case, black em-

ployees constituted approximately 22 to 24 percent of Lukens' hourly workforce (*id.* 60a) and of the local unions' membership (*id.* 132a-133a).[4] The district court found that black members had "actively participated" in local union meetings and affairs (*id.*), as well as in "the negotiations leading to each of the pertinent collective bargaining agreements." (*Id.* 71a.) In addition, undisputed evidence showed that black members had regularly been elected to high union offices. (I JA 180-82, 193-94.) A black member had served as grievance committee chairman—the local union's top grievance-processing official—for more than 5 of the 13 years from 1967 to trial (I JA 207, 224; II JA 714-15.) Black members had also been consistently elected to serve as grievance committeemen and assistant grievance committeemen (II JA 714-715), and had regularly been selected as shop stewards—the front-line representatives in the grievance procedure—in numbers that exceeded their percentage in the bargaining unit (I JA 256-57; II JA 634, 638).

Under the Lukens collective bargaining agreement, disputes over the meaning or application of the agreement are to be resolved through the grievance procedure. If a grievance is not resolved between the company and the unions, it can be arbitrated. Large numbers of grievances are filed, but only a small percentage are taken to arbitration.[5] The undisputed evidence at trial showed, and the district court found, that at both ends of the

---

[4] There are two local unions at Lukens, for historical reasons relating to the corporate structure of Lukens. (See Pet. App. 59a.) At all times since World War II, Local 1165 has been substantially larger than Local 2295; at the time of trial, Local 1165 had 2600 members, while Local 2295 had 80 members. (*Id.* 133a.) The percentage of black members is also higher in Local 1165 than in Local 2295. (*Id.*)

[5] In the 5-year period from 1976 through 1980, a total of 1804 grievances were filed. (II JA 489.) In the twelve and a half years from June 1967 through December 1979, only 86 grievances of individual employees were heard in arbitration. (II JA 712.)

process—at the initial filing and in arbitration—the percentage of grievances that the unions prosecuted for black employees equaled or exceeded the percentage of black employees in the bargaining unit.[6] The undisputed evidence also showed that the unions' success rate in arbitration was substantially better for black grievants than for white grievants.[7]

At all times since 1965 the collective bargaining agreement at Lukens has contained a general non-discrimination clause, which provides:

> It is the continuing policy of the Company and the Union that the provisions of this Agreement shall be applied to all employees without regard to race, color, religious creed, national origin, or sex.

(II JA 359.)

Numerous union officials—both black and white, and including some of the plaintiffs' witnesses—testified that it was the unions' policy to try to remedy individual employees' complaints of race discrimination through grievances and other complaints against Lukens. (*E.g.*, I JA 64, 210, 242, 250, 256, 278-79.) Records of grievances introduced as exhibits showed that in a number of cases the unions asserted explicit claims of discrimination on behalf of black employees.[8]

In other instances, where the grievance could be grounded on another provision of the contract, such as the seniority clause, a grievance for a black employee

---

[6] Pet. App. 93a, 136a; II JA 489 (25.67% of grievances filed from 1976-1980 were filed on behalf of black employees); II JA 712 (48.8% of all individual grievances arbitrated from 1967-1979 were black employees' grievances).

[7] Pet. App. 136a; II JA 713 (from 1967-1979 grievances were granted in whole or in part in 61.4% of the grievances arbitrated for black employees; the comparable figure for white employees was only 31.8%).

[8] *E.g.*, II JA 411, 415, 418, 422, 424, 434-36, 448-49, 451-54, 491, 532, 604-14, 617, 619, 622, 657, 659, 669, 684, 703, 706-08. *See also* II JA 592-603.

would be filed without an express claim of race discrimination.[9] Union representatives, black and white alike, explained that in their experience an individual grievant is more likely to get what he wants when the grievance is based on some objective requirement of the contract than when the grievance is based on the contractual nondiscrimination clause. When complete relief is available for the grievant under the more specific provision of the contract, "it doesn't add anything to add racial discrimination [to the grievance] as well." (I JA 302. See also *id.* 261-62, 266, 269, 273.) Union officials also testified that Lukens was less willing to settle grievances that included allegations of discrimination, and that the unions could be more successful in getting what the grievant wanted—such as a promotion, or backpay—if they omitted the claim of racial discrimination when there was another contract provision that could provide full satisfaction of the grievance. One witness, who had been a union officer for 30 years, testified as follows:

> Q. In your experience what is the effect of alleging race discrimination in a grievance?
>
> A. You mean just a straight grievance on race discrimination or a grievance involving something else?
>
> For instance, I have had a man say: "Hey, I think they are discriminating against me by not giving me a promotion."
>
> The main thing we are after here is promotion.
>
> Now, if we get too many issues involved, then we got two problems to settle. And unless the man has some real good information with regard to discrimination, it is difficult—it makes it more difficult to settle.
>
> If you have the two things in there together, then the company gets their back up a little more and it is hard to settle the whole thing.
>
> We found it is better if we say: "You have refused a man a promotional opportunity that is

---

[9] *See e.g.*, I JA 52, 142-44, 144-48, 188, 254-55, 301; II JA 392, 455-61.

> due him. Treat every man as a man, not as he goes to this church, that church, black or white, but treat every man as a man."
>
> * * *
>
> The main thing we are after is the economics in the situation, the more money for the man, the promotional opportunity or to have something removed from his record.

(I JA 187 ,188-89).[10]

The district court credited this testimony and found that the unions did perceive that the company was less willing to resolve grievances that expressly alleged racial discrimination. (Pet. App. 138a.) The district court did not find that the unions were in any way motivated by race in making these tactical judgments about the best way to frame grievances. (*Id.*) The district court also found that the unions' prosecution of grievances had "adequately protected blacks" and had "satisfactorily and properly resolved" individual claims of discrimination in such company practices as discharges of non-probationary employees, work assignments, shift differentials and overtime. (*Id.* 93a, 101a.) Nonetheless, the court found that the unions' preference for basing grievances on contract provisions other than the non-discrimination clause was "unacceptable," because "vigorous pursuit of claims of racial discrimination would have focused attention upon racial issues and compelled some change in racial attitudes." (*Id.* 138a.)[11]

---

[10] See also I JA 157-58, 239-40, 247, 301-02.

[11] The district court gave one other reason for finding the unions' practice "unacceptable": complaints that an employee had suffered racial harassment from a supervisor or fellow employee often did not involve any contract provision other than the non-discrimination clause. (Pet. App. 138a.) As a result, the district court concluded, racial harassment "grievances involving no loss of pay or permanent disciplinary record were virtually ignored." (*Id.*) The district court did not find that the unions' treatment of harassment complaints was based in any way on an impermissible racial motivation. (*Id.*) Nonetheless, on the basis of this finding alone, the district

2. *The Unions' Opposition to Lukens' Testing Practices.* Lukens, like many other employers in the steel industry, used written tests as a selection device for certain positions in the bargaining unit.[12] The district court found that the unions consistently opposed these tests. (Pet. App. 137a; *see also id.* 90a.) Indeed, undisputed evidence, in the form of testimony by union negotiators and contemporaneous union documents, established that the unions vigorously opposed the use of such tests at Lukens and throughout the industry because they were a barrier to employees' exercise of seniority rights to claim opportunities for better jobs, and, in the unions' view, they tested skills and knowledge that in many instances had no relation to the jobs in question. This same undisputed evidence also established that the unions had a particular concern that written tests tended espe-

---

court found the unions liable for "[t]oleration and tacit encouragement of racial harassment." (*Id.* 147a.)

This liability finding is not before the Court, because the court of appeals vacated the district court's underlying finding that racial harassment at Lukens was a class-wide problem. After revising the limitations period for claims asserted under § 1981, the court of appeals was unable to determine whether incidents of racial harassment had occurred frequently enough after 1971 to support a class-wide finding of liability, or whether it was "something which occurred only in a few isolated incidents." (*Id.* 14a-15a.) The district court had found approximately 35 such incidents in the 13-year limitations period or shortly before (*id.*), and the number of incidents of which the unions were aware was considerably smaller—about 13. Moreover, the record showed that in 10 of those 13 cases, the unions took some action, which included filing grievances, to prevent a recurrence of the harassment or to obtain other relief for the victim. (*See, e.g.*, I JA 142-44; II JA 451-52, 534-35; Plaintiffs' Exhibits 696-697 (admitted at Tr. 6.42); Plaintiffs' Exhibit 853 (admitted at Tr. 14.252-.254); Union Exhibit 265 (admitted at Tr. 28.113-.115).)

[12] The tests primarily used by Lukens during the limitations period were the Wonderlic Test, which was discontinued in 1971, and the Lukens Shop Math Test, which Lukens developed and began using as a criterion for entry into most craft jobs after 1973. (Pet. App. 87a-90a.)

cially to disadvantage black employees, and that the unions communicated this concern to management. (I JA 71-72, 184-86, 197, 270-71, 274-75; II JA 537, 548-50, 552, 558-59, 560, 563, 566-68, 573, 689-90).[13]

Because testing of this kind was an industry-wide problem, the International Union addressed it on the industry level. The first step was collective bargaining with the major steel companies, to negotiate for and obtain a contract provision restricting the use of tests. (I JA 231, 271.) Lukens, as a smaller company, was not directly involved in these negotiations, but agreed to an identical contract provision, as it generally did with major contract improvements that came out of industry-level bargaining. (Pet. App. 132a; I JA 185-86, 193.) This contract provision imposed three independent restrictions on tests used in connection with competition for jobs under seniority agreements. Any such test "must in any event be a job-related test"; all tests must also be "fair in their makeup and in their administration" and "free of cultural, racial or ethnic bias." (II JA 360-63, 538-41.)

The unions' second step was to devise an industry-level program for enforcing these testing restrictions, using the resources of the International Union's Arbitration Department. The author of this enforcement program was the director of that department, who is black, and the primary reasons for his industry-level approach to this problem were the unusual degree of complexity of the issues, the level of technical knowledge needed to arbitrate testing cases, and the unusual expense of such arbitrations. (I JA 232-35). In this enforcement program, the Director of Arbitration focused his efforts on the contract requirement that all tests "must in any event be . . . job-related." Because that requirement under the contract is absolute, and unlike Title VII

---

[13] The International Union's negotiating documents that appear in the Joint Appendix are all identified and described in II JA 716-18.

does not depend upon an additional showing of discriminatory racial impact, the union can win a grievance by showing that the test in question is not job related, without also having to prove that the test has a disparate impact or other form of "racial bias." By proving that a test is not job related, the union can eliminate use of that test as to all employees, without undertaking the added complexity and expense of also proving a disparate impact. A victory on grounds of racial bias alone might not have the same broad effect. (I JA 237.) Moreover, at the time of trial, the Arbitration Department had a 100 percent success rate on the issue of job-relatedness; it had won every case it had arbitrated on that issue. (I JA 236.)[14]

The district court found that "[a]lthough the unions did object to Lukens' use of tests of all kinds, the unions never based their opposition on the assertion that the tests had racially disparate impact . . . ." (Pet. App. 137a.) Instead, the district court found, "the unions argued only their traditional position" that tests undercut seniority rights. (*Id.*)

3. *Grievances Over the Discharge of Probationary Employees.* The Lukens collective bargaining agreement,

---

[14] At the time of trial the Arbitration Department was preparing to arbitrate a grievance challenging the use of Lukens' Shop Math Test, on grounds that it was not job-related within the meaning of the contract. (I JA 230, 279; II JA 630.) At Lukens, the unions had also filed a grievance in 1970 over the company's plan to use the Wonderlic test, among others, for the selection of employees to man the new Strand Casting unit. (II JA 641, 646, 652). Shortly after the unions appealed that grievance to arbitration, the company decided to drop the Wonderlic from the battery of tests it was using for that purpose. (II JA 644, 653-54, 693, 695-96, 698, 702.)

There is no record evidence that the unions at Lukens failed to pursue any employee's complaint about the Wonderlic test or the Shop Math Test after the contractual testing restrictions took effect. In addition, undisputed evidence shows a number of grievances and complaints that the unions pressed over Lukens' use of other tests. (*E.g.*, I JA 153-54, 211-12, 240; II JA 604, 615, 622, 703.)

like those throughout the steel industry, provides that every new employee must serve a probationary period during which he may be discharged in the company's exclusive discretion. (I JA 268; II JA 370.) After that probationary period has been successfully completed, the employee comes under the protection of the contract's requirement that there be "just cause" for discharge, and acquires the right to have the company prove its "just cause" in the grievance/arbitration procedure. (I JA 268; II JA 368.)

Before 1974 the collective bargaining agreement included only one restriction applicable to the discharge of probationary employees: it provided that the company's discretion to discharge "will not be used for purpose of discrimination *because of membership in the Union.*" (I JA 268; II JA 370, emphasis added.)[15] In the 1974 industry-level negotiations, the International Union negotiated a "change" or "improvement" that for that first time also prohibited management from using this discretionary power to discharge probationary employees "for purpose of discrimination because of race, color, religious creed, national origin or sex . . . ." (I JA 268-69, 273.) The same clause was added to the Lukens contract, effective August 1, 1974. (II JA 378-79; Tr. 14.61-.63.) After that date there were relatively few probationary discharges at Lukens, and it would have been difficult to discern a pattern of discrimination in such discharges from statistical evidence.[16]

---

[15] The general non-discrimination clause, quoted *supra*, at page 8, provided only that *"the provisions of this Agreement* shall be applied to all employees without regard to race . . ." (emphasis added). That language by its terms did not apply to management's exercise of its retained discretion to discharge probationary employees.

[16] Because the issue was not focused on at trial there is no single exhibit that summarizes the number of probationary discharges during this period. The record, however, contains copies of Lukens' documentation of all probationary discharges in the period covered by the statistical evidence at trial. Those documents show that between August 1, 1974, and December 31, 1974—the first five

The record contains very little evidence about the unions' enforcement of the special non-discrimination clause applicable to probationary employees. No witness testified that he had ever complained to the union about a probationary discharge. The president of Local Union 1165, though apparently unaware of the new provision (I JA 168; Tr. 14.61-.63), testified that within the year preceding trial the International Union had instructed local officers to try to make a record of probationary discharges to see whether there was a provable pattern of racial discrimination. The local union was in the process of doing so but did not yet have enough evidence to make such a record. (I JA 166-67.) The only other evidence on this point was the testimony of the chairman of the grievance committee, a black employee who had held the office for less than a year. He testified, "we don't file grievances for probationary employees," because the unions have "no jurisdiction" over "new hires." (I JA 224, 226-27.)

Based on the testimony of the grievance chairman, the district court found that the unions had a "uniform policy of not filing grievances on behalf of probationary employees, for any reason." (Pet. App. 137a.) The court also found that the collective bargaining agreement had prohibited racial discrimination against all employees, probationary or permanent, since 1965 (*id.*), and that the unions knew that Lukens was discharging black probationary employees "at a disproportionately higher rate than whites." (*Id.*)[17]

---

months after the new contract clause became effective—Lukens discharged 28 black employees and 22 white employees while on probation. From January 1, 1975, to February 1977, the end of the period covered by the evidence on discharges, only 4 black employees and 8 white employees were discharged while on probation. *See* Lukens' Exhibits 2032-2158 (discharges of white probationary employees); Lukens' Exhibits 2213-2372 (discharges of black probationary employees); Tr. 22.3-22.6 (where exhibits are explained and admitted into evidence).

[17] The unions challenged these latter two findings on appeal on grounds that they were, respectively, an erroneous construction of

4. *Grievances Over Company Discrimination in Initial Assignments.* At Lukens, as in many parts of the steel industry, management for many years took race into account in assigning new employees to vacant jobs within the plant. (Pet. App. 68a; I JA 262-63.) These initial assignments are an integral part of the hiring process. (I JA 263-64, 267.) Beginning in the late 1950s, the International Union tried repeatedly in industry-level bargaining to obtain a contractual non-discrimination clause that would prohibit racial discrimination "in all matters pertaining to hiring." (I JA 267; II JA 576, 577.)[18] The industry consistently refused to agree to such a clause, maintaining a staunch position that hiring and initial assignments were none of the unions' business. (I JA 267-68.)

Finding it impossible to obtain a direct prohibition of discrimination in initial assignments, the unions bargained for and obtained contract provisions that gave every employee the right to transfer from his initially assigned job to a seniority unit of his own choosing, based on seniority (I JA 263-65.) These transfer rights gave each employee the means by which to "overcome [the initial] assignment" at an early point in his career by transferring to another part of the plant. (I JA 263.) The undisputed testimony of the International Union's chief negotiator on seniority issues, as well as contemporaneous union documents, established that one of the

---

the contract and clearly erroneous. The court of appeals apparently rejected both arguments. (Pet. App. 24a & n.9.)

[18] Compare this proposed language with that of the nondiscrimination clause that Lukens and the rest of the industry accepted, quoted at page 8, *supra*. (I JA 268; II JA 359, 691-92.) The clause that the industry accepted is limited to the application of the provisions of the collective bargaining agreement. Because the industry has never agreed to any contractual provisions governing hiring (other than the statement in the management rights clause that hiring is exclusively the prerogative of management, *see, e.g.*, II JA 368), the existing nondiscrimination clause does not have any application to the hiring and initial assignment of new employees. (I JA 267-68.)

unions' primary reasons for negotiating these transfer rights was to address the problem of management's racial discrimination in initial assignments and to open all jobs to all employees regardless of race. (I JA 263, 269; II JA 545-47, 587, 719; see also I JA 194-95.) As a result of these bargaining efforts, employees at Lukens have had the right since 1962 to use their full company seniority to transfer to job vacancies anywhere in the plant. (Pet. App. 63a-64a.)[19]

The district court acknowledged that the collective bargaining agreements "do not give the unions any voice in initial assignments." (Pet. App. 139a.) Nonetheless, the court concluded that the unions could have challenged discriminatory assignments on the theory that "once employees are hired, they are entitled to the protections of the collective bargaining agreement" and that "[t]o require blacks to continue to work in lower paying and less desirable jobs, in units disparately black, is to discriminate against them in violation of the collective bargaining agreement (and, of course, also in violation of Title VII.)" (*Id.*) The district court found that the unions had never tried to use "this rather obvious mechanism for protecting the interests of their members." (*Id.*)[20]

---

[19] After obtaining the basic transfer right in 1962, the unions subsequently negotiated at Lukens for improvements in the system to eliminate the potential for discrimination or favoritism in competition for transfers. The most significant improvement, achieved in 1971, required that notice of all vacancies available for transfer be posted throughout the plant for bidding by interested employees. (Pet. App. 65a, 80a.) The unions' purpose in negotiating for this change was to prevent certain employees from having an edge over others because they had relatives or friends in the most desirable units who could give them advance word of upcoming vacancies. (Pet. App. 80a; I JA 186, 195-97.)

[20] This "rather obvious" contract theory of discrimination had not been advanced by plaintiffs' counsel at trial or in post-trial briefing, and it was contrary to the interpretation that both the union and the steel industry attached to their contract, as described in the undisputed testimony of the International Union's chief negotiator on this subject. (I JA 267-68.) Given that both parties to the contract understood that the contract did *not* embrace this

C. The District Court's Theory of Union Liability

As we have already described, the district court rejected every claim that the unions had committed acts of discrimination against black employees, and made no finding that the unions had acted in any respect out of a racial motivation. (*See* page 5, *supra*.) The district court summarized all of the facts that it found to support union liability as "repeated failures . . . to include racial discrimination as a basis for grievances or other complaints against the company." (*Id.* 137a.)

The legal theory on which the district court held that the unions were liable, based upon these findings, was succinctly stated as follows:

> [M]ere union passivity in the face of employer discrimination renders the unions liable under Title VII and, if racial animus is properly inferrable, under § 1981 as well.

(*Id.* at 139a.) Although the district court thus recognized that an intent to discriminate is a necessary premise for liability under § 1981, it equated intentional "passivity" with intentional discrimination. The court said:

> [T]he evidence in this case proves far more than mere passivity on the part of the unions. The distinction to be observed is between a union which, through lethargy or inefficiency simply fails to perceive problems or is inattentive to their possible solution (in which case, at least arguably, the union's

---

theory, it is difficult to comprehend what the district court expected the unions to tell an arbitrator. The unions challenged the court's finding on these grounds on appeal, but the court of appeals did not address this argument, presumably because it vacated the underlying finding of company discrimination in initial assignments for want of a proper plaintiff to assert this claim. (Pet. App. 15a-20a.) Although as a result of the order vacating this liability finding, this question is not technically before this Court, the court of appeals invited plaintiffs' counsel on remand to move for intervention of new plaintiffs to revive both this claim and the district court's finding of liability. (*Id.* 20a-30a.)

> inaction has no connection with race) and a union which, aware of racial discrimination against some of its members, fails to protect their interests.

(*Id.* 139a-140a.) The court went on to hold that if a union "intentionally avoids asserting discrimination claims," it is liable under both Title VII and § 1981 "regardless of whether, as a subjective matter, its leaders were favorably disposed toward minorities." (*Id.*)

Based upon this conclusion of liability, the district court entered a permanent injunction against the unions. (*Id.* 155a-159a.) The court also ordered that proceedings begin on "stage two" of the class action, to identify individual victims of the practices it had found unlawful and to determine the relief to which each would be entitled, including individual injunctive relief and back-pay. (*Id.* 149a-150a; I JA 3.) The unions filed an interlocutory appeal from the district court's injunction and the findings of liability that supported it. (I JA 3.)

D. The Court of Appeals' Decision

The court of appeals affirmed on the same "passivity" theory, describing its holding with respect to the unions as follows: "[T]he unions violated Title VII and § 1981 by failing to assert racial bias as grievances . . . ." (Pet. App. 3a.) Although the court of appeals acknowledged that the district court's theory of liability was controversial, it accepted the "premise that there is an affirmative duty on the part of the unions to combat discrimination in the workplace." (*Id.* 25a.) The court also concluded that this duty included the particular obligation to assert claims of race discrimination in grievances. (*Id.* 26a.) It said:

> The case against the unions here is stronger than one of mere acquiescence. The district court found that the unions intentionally avoided asserting claims of discrimination. In so doing, the unions violated the duty of fair representation owed to their members . . . . By shirking their responsibility for pre-

> senting grievances based on discrimination, the unions also violated the duty to enforce the collective bargaining agreement.

(*Id.*, citations omitted.) Then, like the district court, the court of appeals equated an *intentional decision* not to challenge employer discrimination with *intentional discrimination.* The court stated:

> The deliberate choice not to process grievances [alleging discrimination] also violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation. The district court's finding of intentional discrimination properly supports the claims under § 1981 as well.

(*Id.* 26a-27a.) Accordingly, the court of appeals affirmed the district court's findings of union liability and the injunction against the unions. (*Id.* 27a.)[21]

ARGUMENT

Introduction and Summary

Under both Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981, an employee who is the victim of employment discrimination by his employer may sue for relief directly against the employer. The employee may do so whether or not a union is the exclusive bargaining representative for employees in that workplace. Similarly, if it is the union that discriminates against him, he may sue the union directly for relief from that discrimination. This case involves neither of those situations. The question here is whether Title VII or § 1981

---

[21] A recent opinion of the Third Circuit restated that court's understanding of the theory underlying its decision in the instant case. In *Commonwealth of Pennsylvania v. Operating Engineers Local 542*, Nos. 85-1540 and 85-1706 (3rd Cir., Dec. 5, 1986), the court cited the decision in the instant case for the proposition that if the union obtained information of employer discrimination "it will owe an affirmative duty to its minority members to take action against the offending employer or employers to enforce the nondiscrimination provisions of its collective bargaining agreements." *Id.*, slip op. at 23.

places upon the *union* an affirmative duty to enforce the prohibitions against *employer* discrimination that are contained in those statutes—put another way, whether those statutes require a union to make affirmative efforts to prevent or remedy acts of employer discrimination.

The unions in this case have not been found to have engaged in any discrimination against respondents. The only party found to have discriminated in this case is the employer. Thus, for example, it was the employer, not the unions, that was found to have subjected blacks to discriminatory tests for certain promotions and transfers and to have discharged black probationary employees on a discriminatory basis. The courts below held the unions liable in this case not for discrimination committed by the unions but for discrimination committed by the employer.

The courts below reached this result by concluding that Title VII and § 1981 place upon unions an affirmative duty to seek to prevent or remedy employer discrimination. In the words of the district court, "mere union passivity in the face of employer-discrimination renders the unions liable under Title VII" (Pet. App. 139a); and, in the words of the court of appeals, under Title VII "there is an affirmative duty on the part of unions to combat [employer] discrimination . . . ." (Pet. App. 25a.) With respect to § 1981, the lower courts equated an intentional failure by a union to fulfill this "affirmative duty" with intentional discrimination, and thus ruled that § 1981 is violated when a union intentionally decides not to challenge employer discrimination, regardless of whether "its leaders were favorably disposed toward minorities." (Pet. App. 25a, 140a.)

Applying these theories of liability to the facts of this case, the courts below found the unions liable not for a generalized failure to challenge or address discrimination by the employer, but for the failure to do so in a manner deemed by the lower courts to be "acceptable." (Pet. App.

138a.) Thus, the record is replete with undisputed evidence of union attempts to prevent or remedy the very acts of employer discrimination found by the district court: discriminatory tests, discrimination in initial assignments, discrimination in discharges, and racial harassment. See pages 10-17, *supra*. In fact, the district court found a number of instances in which action by the unions had effectively prevented or remedied employer discrimination. See page 10, *supra*; see also Pet. App. 80a-81a. The unions' default, as the courts below saw it, was a "reluctan[ce]" (Pet. App. 138a), where grievances or complaints could be based on some other requirement of the collective bargaining agreement, "to include racial discrimination as a basis for grievances or other complaints against the company" (Pet. App. 137a). While the district court recognized that the unions' approach might achieve full vindication for individual grievants, the court found that this approach would not satisfy the unions' affirmative duty to combat discrimination by the employer:

> [I]t seems obvious that vigorous pursuit of claims of racial discrimination would have focused attention upon racial issues and compelled some change in racial attitudes. [Pet. App. 138a.]

We show in this brief that neither Title VII nor § 1981 places an affirmative duty on unions to combat employer discrimination. And, once that point is established, it follows that neither Title VII nor § 1981 prohibits a union from making an intentional decision, not motivated by racial animus, to refrain from affirmatively attacking an employer's discriminatory conduct: it is not wrong intentionally to refrain from doing that which one has no duty to do.

In part I, *infra*, we show that Title VII does not place an affirmative duty on unions to combat employer discrimination.

A. Section 703(c)(3) of Title VII is the exclusive provision of that Act dealing with the question of union

responsibility for employer discrimination. That section is explicit that the only basis on which a union is to be held responsible for discriminatory conduct by an employer is when the union has "cause[d] or attempt[ed] to cause [the] employer to discriminate." Those words must be understood to create only a negative duty on unions to refrain from bringing about employer discrimination. Consistent with established usage, § 703(c)(3) cannot be construed to place on unions an affirmative duty to combat or challenge employer discrimination.

The plain meaning of the words of § 703(c)(3) is confirmed by this Court's interpretation of the same words in the context of the statutory provision upon which § 703(c)(3) was modeled—§ 8(b)(2) of the National Labor Relations Act ("NLRA"). This Court has understood "cause" as used in the "cause or attempt to cause" standard of § 8(b)(2) to have its normal and established meaning—the union must "bring about" or attempt to "bring about" the employer discrimination.

Only by concluding that Congress did not mean what it said in § 703(c)(3) could a union be found to violate Title VII merely by failing to take action against an employer's discrimination.

B. The approach of the courts below, and of other courts reaching the same conclusion, is based on the assumptions that the failure of a union to combat employer discrimination violates the union's duty of fair representation and that, despite the explicit language of § 703(c)(3), Title VII was meant to incorporate that duty as so understood. This approach reflects a basic misunderstanding of a union's duty of fair representation and the role of unions under the federal labor laws. More than that, interpreting Title VII to compel unions to pursue certain substantive goals would alter the role of unions in a way that would be destructive of the system of collective bargaining established by the national labor laws.

Congress has legislated regarding the workplace in two entirely different ways. Through the NLRA Congress has established a structure and procedure by which private parties, unions and employers, may address and attempt to reach private resolutions of workplace issues according to the parties' particular needs or desires. Establishment of this process does not guarantee any particular substantive results regarding the terms or conditions of employment. Indeed, it is a basic tenet of the system of private collective bargaining established by the NLRA that government may not dictate the substantive positions that unions take in bargaining a contract or in resolving grievances under a contract.

When Congress has determined that employees should have particular substantive rights in the workplace, Congress has fashioned a different kind of legislation: it has legislated rights—including, for example, the rights established by Title VII—that accrue directly to individual workers and that do not depend on the process of collective bargaining.

The duty of fair representation is part of the process of collective bargaining established by the NLRA. The duty requires only that unions exercise their powers as exclusive bargaining representatives in a manner free from improper motivations, and not that unions take certain substantive positions. The duty of fair representation has no application to substantive rights conferred by statute directly upon individual employees.

To place upon unions the obligation to achieve particular substantive objectives through the process of private collective bargaining would alter and burden that process. This Court's cases make clear that Title VII should not be read affirmatively to alter or burden the role of unions in the collective bargaining process without clear and express words calling for such a result. And the words of § 703(c)(3) call for no such infringement upon the collective bargaining system.

In part II, *infra*, we show that § 1981 also does not place upon unions an affirmative duty to combat employer discrimination.

Section 1981 provides that all persons in the United States "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." These words, on their face, provide no basis for holding a union liable for discriminatory conduct of an employer. And, this Court's construction of these words in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375 (1982), leaves no room for such a theory of liability.

In *General Building Contractors*, this Court rejected the argument that § 1981 places an affirmative duty on employers to combat discrimination in the selection of the employers' workforces by a union-operated hiring hall. The analysis of the Court in that case is controlling here: § 1981 prohibits only intentional discrimination; it does not require any party to seek to ensure that another party does not discriminate.

I. TITLE VII DOES NOT PLACE UPON UNIONS AN AFFIRMATIVE DUTY TO COMBAT EMPLOYER DISCRIMINATION

A. The Words of the Statute Create No Such Affirmative Duty

1. The point of departure for determining the meaning of a statute is the statute's language, which after all is what was duly agreed upon by the necessary majority of members of Congress in both houses and adopted as law. *E.g.*, *United States v. James*, —— U.S. ——, 106 S.Ct. 3116, 3121 (1986). In this case, the pertinent language is found in § 703(c) of Title VII, 42 U.S.C. § 2000e-2(c), which defines the practices of unions that constitute violations of the Act.

Section 703(c) contains three distinct proscriptions applicable to unions. The first two of these proscriptions,

§§ 703(c)(1) and (c)(2), have no application here. These subsections are set forth in terms parallel to the prohibitions applicable to employers in §§ 703(a)(1) and (a)(2) and prohibit unions from engaging directly in certain forms of discriminatory conduct. See page 3, *supra*. These provisions do not address the question of union responsibility for employer discrimination—the issue presented by this case. That issue is addressed expressly and exclusively by § 703(c)(3).[22] Subsection 703(c)(3) provides as follows:

---

[22] The court of appeals did attempt to put this case within the framework of § 703(c)(1): "The deliberate choice not to process grievances also violated § 703(c)(1) of Title VII because it discriminated against the victims who were entitled to representation." Pet. App. 26. But that attempt is no more than a play on words and does not bear analysis. At the threshold, though the point may have no legal significance, the district court did not find that the union chose "not to process grievances"; rather, the finding, and the evidence, were that the unions were "reluctant" to assert "racial discrimination as such" in grievances when other grounds for relief could be asserted. Pet. App. 137a-138a. More important, the district court did not find, and there was no evidence to support a finding, that this "reluctan[ce]" was racially motivated. To the contrary, the district court credited the union officials' testimony that this "reluctan[ce]" was predicated upon tactical considerations other than race. See page 10, *supra*. Thus, the unions' "reluctan[ce]" to assert "racial discrimination as such" was not discrimination and was not discriminatorily motivated. At the most, this "reluctan[ce]" could be characterized as a failure to challenge discriminatory conduct of the employer. Where, as here, there is no finding that the union was racially motivated, § 703(c)(1) has no application to such conduct.

The court of appeals attempted to, but could not, alter that reality simply by stating that the "deliberate choice not to" challenge the discrimination of another is itself discrimination. The sponsors of Title VII in the Congress repeatedly assured their colleagues that the concept of discrimination contained in the Act was "clear and simple" and had no "hidden meaning." 110 Cong. Rec. 7207 (1967) (interpretative memorandum of Senators Clark and Case, recognized by this Court as authoritative; *see Teamsters v. United States*, 431 U.S. 324, 350-51 & n.35 (1977)); 110 Cong. Rec. 5863-64 (1964) (remarks of Sen. Humphrey: discrimination has a "pre-

> It shall be an unlawful employment practice for a labor organization—
>
> * * *
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Thus, the Act is explicit that the only basis on which a union is to be held responsible for discriminatory conduct by an employer is a finding that the union has "cause[d] or attempt[ed] to cause [the] employer to discriminate." The word "cause" is basic in our jurisprudence. It has an established meaning. Black's Law Dictionary (Revised Fourth Edition, 1968), at 278, gives the following definition of the verb "cause": "To be the cause or occasion of; to effect as an agent; to bring about; to bring into existence; to make." Consistent with this definition, § 703(c)(3) must be understood to create only a negative duty on unions to refrain from "bring[ing] about" employer discrimination; § 703(c)(3) cannot, consistent with established usage, be construed to place on unions an affirmative duty to combat or challenge employer discrimination.[23]

---

cise, legal meaning"; it means "a distinction in treatment" or "different treatment"); *id.* 7218 (Memorandum by Senator Clark: the meaning of discrimination is clearly established; it is "to make distinctions or differences in the treatment of employees" based upon one of the forbidden criteria); *id.* 7477 (Bipartisan Civil Rights Newsletter No. 9: discrimination "means a distinction in treatment given to different individuals because of their different race, religion, or national origin"). The court of appeals' attempt to stretch the concept of discrimination to cover the failure to challenge discrimination by another party is not faithful to these assurances.

[23] As a leading treatise puts it, "[t]o say that the union 'causes' employer discrimination simply by allowing it is to stretch the meaning of the word beyond its limits." Larson, *Employment Discrimination*, ¶ 44.50, 9-40 (1983).

The relationship between unions and employers is by nature adversarial. *See General Building Contractors Ass'n v. Pennsylvania, supra*, 458 U.S. at 393-394. In this context, if Congress had decided to place upon one private party the duty to police another private party's compliance with the law, that decision would have been novel and remarkable.[24] Congress cannot be found to have intended such a result by the use of words that cannot bear that meaning. If Congress had intended to place on unions a legal obligation to combat employer discrimination, Congress could have found words to say so. Only by concluding that Congress did not mean what it said in § 703(c)(3) could a union be found to violate Title VII merely by failing to take action against an employer's discrimination.[25]

---

[24] That decision would have been especially remarkable in light of the fact that labor unions provided key support for inclusion of a fair-employment-practices title in the Civil Rights Act and also provided key support for the Act's passage. *See, e.g.*, 110 Cong. Rec. 7205-06 (remarks of Sen. Clark); *id.* 7482 (Bipartisan Civil Rights Newsletter No. 25). The Steelworkers Union was one of the primary union supporters of the legislation, and at the time was credited with obtaining some critical votes for cloture in the Senate "which might well have been lost but for the Union's efforts." (I JA 315, 318-19; see also II JA 586.) *See also* Schmidt, *Title VII: Coverage and Comments*, 7 B.C. Indus. & Com. L. Rev. 459, 464 (1966) ("without the support of some key elements of organized labor, it is doubtful that Title VII would have been enacted at all").

[25] The only employment discrimination case in this Court that even remotely touches on the meaning of § 703(c)(3) is *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1976). In *McDonald*, the primary issue was whether discrimination by an employer against white employees in meting out discipline violates Title VII. There was a secondary issue of union liability in *McDonald* based on allegations in the complaint that the union had "acquiesced and/*or joined in*" the company's alleged racial discrimination by negotiating a lighter penalty for a black employee than for white employees charged with the same misconduct. *Id.* at 284 (emphasis added). The lower courts dismissed the complaint as to all defendants, holding that employees who admit having committed a crime

2. While we believe the bare words of § 703(c)(3) are conclusive of the point, the meaning that flows from those words is confirmed by this Court's interpretation of the same words in the context of the statutory provision upon which § 703(c)(3) was modeled.

In 1935, Congress enacted the National Labor Relations Act ("NLRA") which contained a number of proscribed *employer* practices including, in § 8(3) (now § 8(a)(3)), "discrimination in . . . any term or condition of employment to encourage or discourage membership in a labor organization." 29 U.S.C. § 158(a)(3). In the Labor Management Relations Act of 1947, Congress amended the NLRA to add, *inter alia*, certain proscribed *union* practices. In particular, in § 8(b)(2) of the NLRA, as amended, 29 U.S.C. § 158(b)(2), Congress made it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)." The identity of the

---

against their employer cannot invoke the protection of Title VII. *Id.* at 278. This Court reversed and reinstated the complaint. *Id.* at 283. On the issue of union liability, the Court explained its holding as follows:

> The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees apply equally to the union; and whatever factors the mechanisms of compromise may legitimately take into account in mitigating discipline of some employees, under Title VII race may not be among them. [*Id.* at 285.]

As the quoted sentence demonstrates, the Court understood the complaint in *McDonald* to allege that the union had "take[n] [race] into account" in negotiating a compromise that favored a black employee over the whites. Such an action would constitute intentional discrimination by the union, not failure to oppose employer discrimination. Nonetheless, the court below construed *McDonald* to support the theory that unions are liable simply because they fail to make affirmative efforts to stop an employer from discriminating. Pet. App. 26a.

language of § 8(b)(2) and of § 703(c)(3) makes it apparent that the former was the source for the latter.[26]

This Court has had occasion to state its understanding of the "cause or attempt to cause" language in § 8(b)(2). Thus, in *Machinists v. Gonzales*, 356 U.S. 617, 622 (1958), the Court said that "union conduct . . . *designed to bring about employer discrimination* against an employee" is "the evil the Board is concerned to strike at as an unfair labor practice under § 8(b)(2)." (Emphasis added.) The question before the National Labor Relations Board in an § 8(b)(2) proceeding is "the nexus between union action and employer discrimination." *Id.* at 623. And, the analysis of the Court in *Electrical Workers v. Labor Board*, 341 U.S. 694, 703 (1951), assumed that even a finding of union "encouragement" of employer discrimination would not satisfy the "cause or attempt to cause" standard:

> The intended breadth of the words "induce or encourage" in § 8(b)(4)(A) is emphasized by their contrast with the restricted phrases used in other parts of § 8(b). For example, the unfair labor practice described in § 8(b)(1) is one "to restrain or coerce" employees; in § 8(b)(2) it is to "cause or attempt to cause an employer"; in § 8(b)(5) it is to "require of employees"; and in § 8(b)(6) it is to "cause or attempt to cause an employer." The scope of "induce" and especially of "encourage" goes beyond each of them.

See also Radio Officers v. Labor Board, 347 U.S. 17, 52 (1954) (§ 8(b)(2) violation established where "the employer discriminated upon the instigation of the union").

Thus, this Court has understood "cause" as used in the "cause or attempt to cause" standard of § 8(b)(2) to

---

[26] Similarly, this Court has noted that § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g), the statute's remedial provision, was modeled after the remedial provision of the NLRA. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 769 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975).

have its normal and established meaning—the union must "bring about" or attempt to "bring about" the employer discrimination. The decisions of the courts of appeals and of the Labor Board interpreting the § 8(b)(2) standard have been consistently of the same view. *See, e.g., Glasser v. NLRB*, 395 F.2d 401, 406 (2d Cir. 1968) ("in order for union conduct to violate section 8(b)(2) . . . there must be some direct approach to the employer, or some conduct aimed at him, for the purpose of causing the employer to discriminate"); *NLRB v. Jarka Corp.*, 198 F.2d 618, 621 (3rd Cir. 1952) (the "relationship of cause and effect [is] the essential feature of § 8(b)(2)"; union must have "accomplished" the employer discrimination); *Newspaper & Mail Deliverers' Union of New York & Vicinity (Herald-Tribune)*, 93 N.L.R.B. 419 (1951).

The uniform decisional law on the interpretation of § 8(b)(2) is important not simply because it reflects the judicial and administrative understanding of words identical to those that govern this case. This line of authoritative interpretation was firmly established prior to enactment of Title VII. It is appropriate to assume that when Congress chose to borrow the words of § 8(b)(2) for use in § 703(c)(3) of Title VII, Congress's use of those words was informed by the established judicial and administrative interpretation. *See, e.g., Randall v. Loftsgaarden*, —— U.S. —— ,106 S.Ct. 3143, 3153 (1986); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473 (1959).

3. The legislative history of Title VII does not otherwise throw any direct light on the meaning of the "cause or attempt to cause" standard of § 703(c)(3). But there is legislative history associated with the passage of the Equal Pay Act of 1963 that is pertinent here. The Equal Pay Act, which was enacted when active consideration of Title VII by Congress was already well underway,[27] con-

---

[27] The Equal Pay Act was enacted June 10, 1963. Pub. L. 88-38, 77 Stat. 56. Hearings on H.R. 405, which was the source of the basic provisions of Title VII (including § 703(c)(3)), were held

tains the same standard of union liability for employer conduct as that stated in § 703(c)(3): under the Equal Pay Act, "[n]o labor organization . . . shall cause or attempt to cause such an employer to discriminate against an employee in violation of . . . this subsection." 29 U.S.C. § 206(d)(2). The legislative history of this provision reconfirms that the "cause or attempt to cause" standard should be understood according to the natural meaning of the words used.

Enactment of a statute providing for equal pay for equal work posed a particular problem in unionized sectors of the economy. Where employees are represented by unions, wage rates are most often prescribed by a collective bargaining agreement. Wage rates violative of the law might thus be required by a contract between an employer and a union. In such a circumstance, the union would be a direct party to an unlawful contract. But, under the Senate version of the bill, the Equal Pay Act would have placed upon employers the sole responsibility for conforming to the wage requirements of the Act. The House was concerned that under the Senate Bill an employer trying to bring his wage scale into compliance with the Act might meet resistance from a union seeking to maintain compliance with the existing contract, or seeking to negotiate a new contract with a discriminatory pay scale.

This problem was addressed in the House bill by a provision containing the language, quoted above, now codified in 29 U.S.C. § 206(d)(2). 109 Cong. Rec. 9209 (1963). As Rep. Carey explained, this "feature[] of this bill . . . seeks to prevent any labor disputes . . . by prohibiting labor unions from *seeking to induce employers* to violate the act." *Id.* at 9207 (emphasis added). The following colloquy reflects precisely what Congress had in mind:

---

in April, May, and June of 1963. *Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor on H.R. 405 and Similar Bills*, 88th Cong., 1st Sess. 5 (1963).

> Mr. O'HARA of Michigan. [After reciting what is now 29 U.S.C. § 206(d)(2).]
>
> It is my understanding, as it is the understanding of the gentleman from New York that if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, they would be subject to all the penalties and all the enforcement provisions provided under the Fair Labor Standards Act.
>
> Mr. GOODELL. I would stress the word "maintaining" in your reply, because we feel that the words "shall cause or attempt to cause" put an obligation on a labor union, as well as the employer, to change that existing agreement, if the agreement is in violation of this act and this requires the employer to violate the act. Does the gentleman agree?
>
> Mr. O'HARA of Michigan. I would agree. Not only does it refer to new agreements but to an existing agreement where a labor organization would attempt to maintain a discriminatory pattern in an old agreement and resist efforts to change to the pattern required by this act. [*Id.* at 9209.]

Thus, the "cause or attempt to cause" language of the Equal Pay Act was designed to prevent unions from seeking to "induce employers to violate the act" by attempting to negotiate or maintain contracts providing for discriminatory wage rates.[28] An analogy in the pure Title VII context would be union efforts to negotiate or maintain contracts calling for racially discriminatory job assignments.[29] There is no suggestion in the Equal Pay Act

---

[28] The Department of Labor regulation implementing that provision follows this understanding of the scope of the provision. 29 CFR § 800.106.

[29] A number of the lower courts' Title VII decisions that articulate the theory of union liability for failure to make affirmative efforts to prevent or remedy employer discrimination in fact involve direct union participation in some act or practice of discrimination, as for example, negotiating an unlawful contract provision. *E.g., Terrell v. United States Pipe & Foundry Co.*, 644 F.2d 1112, 1120-21 (5th Cir. 1981), *vacated on other grounds*, 456 U.S. 955

materials that the "cause or attempt to cause" language was meant to impose on unions an affirmative duty to combat employer discrimination to which the union is not a party.[30]

B. Any Such Affirmative Duty Would Be Inconsistent with the National Labor Policy

So far as we can discern, the conclusion of the courts below, and of some other federal courts, that Title VII places an affirmative duty on unions to combat employer discrimination stems from the belief that unions already have such a duty under the federal labor laws—in the form of the duty of fair representation—and that Title VII was meant, despite its explicit language, to incorporate that duty. Thus, from the seminal case in this line, Judge Skelly Wright's opinion for the District of Columbia Circuit in *Macklin v. Spector Motor Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 478 F.2d 979, 989 (1973), to the decision below (see Pet. App. 26a), the approach has been that the failure of a union to combat employer

---

(1982); *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1304 (9th Cir. 1982), *cert. denied*, 467 U.S. 1251 (1984); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978), *cert. denied*, 459 U.S. 844 (1983); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 270 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1379 (5th Cir. 1974); *Romero v. Union Pacific R.R.*, 615 F.2d 1303, 1310-11 (10th Cir. 1980). In the decision below, the Third Circuit relied on several of these cases as support for imposing liability on the unions in this case even though they had not agreed to any unlawful contract provision or joined in any unlawful acts but had merely failed to oppose the employer's discrimination. (Pet. App. 25a-26a).

[30] Judicial interpretations of the Equal Pay Act consistently support this reading of the "cause or attempt to cause" provision. *See Hodgson v. Baltimore Regional Joint Board*, 462 F.2d 180, 181 (4th Cir. 1972), *aff'g, Hodgson v. Sagner, Inc.*, 326 F. Supp. 371, 374-75 (D.Md. 1971) (union violated Act by "insisting on" and "instigati[ng]" an employer violation); *Murphy v. Miller Brewing Co.*, 307 F. Supp. 829, 839 (E.D. Wis. 1969), *aff'd on appeal of other issues*, 457 F.2d 221 (7th Cir. 1972) (union did not violate Act where it did not propose discriminatory wages or otherwise act affirmatively to cause employer to discriminate).

discrimination violates the union's duty of fair representation and thus also violates Title VII.[31]

But, as we now show, this approach reflects a basic misunderstanding of a union's duty of fair representation and, more fundamentally, of the role of unions under the federal labor laws. More than that, by interpreting Title VII to compel unions to pursue certain substantive goals, the cases in the *Macklin* line would alter the role of unions in a way that would be destructive of the system of collective bargaining established by the national labor laws. Title VII should not be so construed in the absence of a clear and express basis in the statute for such a construction.

1. Congress has legislated regarding the workplace in two entirely different ways. Through the NLRA, Congress has established a structure and procedure by which private parties, unions and employers, may address and attempt to reach private resolutions of workplace issues according to the parties' particular needs or desires. Establishment of this process does not guarantee any par-

---

[31] The other court of appeals' decisions that have squarely adopted the view that Title VII creates a union duty to make affirmative efforts to combat employer discrimination are: *Howard v. International Molders Union*, 779 F.2d 1546, 1552 (11th Cir.), *cert. denied*, 106 S.Ct. 2902 (1986); *EEOC v. Detroit Edison Co.*, 515 F.2d 301, 314 (6th Cir. 1975), *vacated on other grounds*, 431 U.S. 951 (1977). In addition, the cases cited in note 29, *supra*, contain passages that suggest adoption of this theory of liability, although the facts alleged or proved in each of those cases showed direct union involvement in the discrimination.

The Seventh Circuit has rejected the view that unions are liable for a "[m]ere failure . . . to protect . . . employees from discriminatory corporation policies . . . ." *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974). *See also Babrocky v. Jewel Food Co.*, 773 F.2d 857, 868-69 (7th Cir. 1985). The Second Circuit may also have rejected this view. *See Philbrook v. Ansonia Bd. of Ed.*, 757 F.2d 476, 487 (2d Cir. 1985), *remanded on other grounds*, 107 S.Ct. 367 (1986). In addition, a recent Sixth Circuit case may reject the view that a union has a specific obliga-

ticular terms or conditions of employment. In that regard, when Congress has determined that employees should have particular substantive rights in the workplace, Congress has fashioned a different kind of legislation: it has legislated rights—including, for example, the rights established by Title VII—that accrue directly to individual workers and that do not depend on the process of collective bargaining. The duty of fair representation is an integral part of the process of collective bargaining established by the NLRA and has no application outside of that sphere.

a. Employees have many objectives: job security, wages, pensions, health insurance, workplace safety, freedom from invidious discrimination, and countless others. The NLRA establishes a process by which employees may join together to use their collective strength in pursuit of whatever objectives the employee group deems most important. Through their union, employees *collectively* decide which objectives they want to pursue and what measures and what sacrifices they are willing to undertake in support of that pursuit. Such decisions are made with the knowledge that employers and unions are separate and autonomous entities which "proceed from contrary and to an extent antagonistic viewpoints and concepts of self interest." *General Building Contractors Ass'n*, *supra*, 458 U.S. at 394. The objectives the union succeeds in securing in bargaining are directly dependent on the collective economic strength of the employees as compared to the economic strength of the employer. Given that the bargaining power of the employees is finite, achievement of any union objective is at the cost of some other objective. *Cf. Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974).

---

tion to make arguments of racial discrimination in grievances. *Haynie v. Ross Gear Division of TRW, Inc.*, 799 F.2d 237, 239, 242-43 (6th Cir. 1986).

This Court has repeatedly stated that insofar as the system of private collective bargaining is concerned, government regulation is limited to the supervision of the process of bargaining, and government may not dictate the substantive positions that unions take in bargaining a contract or in resolving grievances under a contract. "[T]he fundamental premise on which the [National Labor Relations] Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970). "The goal of federal labor policy . . . is . . . to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959). That goal is "served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves." *Id.* The parties determine their own bargaining agendas and their own priorities and make their own compromises and agreements. "[G]overnment may not step in and become party to the negotiations," *Golden State Transit Co. v. Los Angeles*, —— U.S. ——, 105 S. Ct. 1395, 1401 (1986), because Congress "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences," *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960).

In determining their substantive positions and priorities, unions are often confronted with competing demands on scarce resources and with issues in regard to which employees in the bargaining unit have legitimate competing interests. This Court has understood that inherent in the process of determining what is best for the collective interest is the need sometimes to balance off the legitimate interests of some members of the bargaining unit against the equally legitimate interests of other members of the

unit. It is often a union's function to "balanc[e] individual and collective interests" so as to develop proposals and strategies that produce "increased benefits for workers in the bargaining unit as a whole." *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 742 (1981). A union must be free to take a position "contrary to that of some individuals whom it represents." *Humphrey v. Moore*, 375 U.S. 335, 349 (1964).

> Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance processes. [*Id.* at 349-50.]

Consistent with these principles, the duty of fair representation does not place unions under any obligation to take a particular substantive position. Rather, the duty was derived from the NLRA to protect against *abuse* by unions of the exclusive bargaining status conferred by that statute. In *Del Costello v. Teamsters*, 462 U.S. 151, 164-65 n.14 (1963), this court explained the derivation of the duty:

> The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative . . . . The duty stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." [*Quoting from Vaca v. Sipes*, 386 U.S. 171, 182 (1967).]

Thus, the duty requires that unions exercise their powers under the Act free from improper motivations, not that unions take certain substantive positions. In precise terms, the duty requires that positions taken and decisions made by unions must be reached "honestly, in good faith, and without hostility or arbitrary discrimination." *Humphrey v. Moore, supra,* 375 U.S. at 350.

b. In a number of areas Congress has concluded that it is necessary or appropriate for employees to enjoy substantive employment rights regardless of their collective economic strength or their collective bargaining decisions or priorities. In those areas, Congress has enacted statutes directly establishing the rights in question—for example, the FLSA,[32] OSHA,[33] ERISA,[34] and Title VII. These statutes create "federal minimal employment standards" that are "independent of the collective bargaining process" and that "devolve on [employees] as individual workers, not as members of a collective organization." *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724, ——, 105 S.Ct. 2380, 2397 (1985).

Congress has not given unions the responsibility of enforcing these statutory rights against employers. Because these rights "devolve on [employees] as individual workers, not as members of a collective organization," individual employees are entitled to enforce these rights without any need for union involvement. And because the "duty of fair representation . . . is coextensive with [the union's] statutory authority to act as the exclusive representative for all the employees within the unit," *Schneider Moving & Storage Co. v. Robbins,* 466 U.S.

---

[32] The Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*

[33] The Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq.*

[34] The Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.*

364, 376 n.22 (1984); see also *DelCostello v. Teamsters*, *supra*, 462 U.S. at 164-65 n.14, that duty does *not* extend to those areas in which the individual employee is not dependent on his union for enforcement of a right but is entirely free to advance and protect his own interests. *Cf. Barrentine v. Arkansas-Best Freight System*, *supra*, 450 U.S. at 742. *See, e.g., Freeman v. Teamsters Local 135*, 746 F.2d 1316, 1321 (7th Cir. 1984).

2. The decisions of the courts below, and of the other courts that share the same view, confuse the two distinct types of federal labor legislation just described. These decisions would make unions responsible for the enforcement of statutory rights that individual employees are entitled to enforce on their own. In so doing, these decisions would interfere substantially with the collective bargaining process as Congress intended that process to function.

To illustrate this point, it is necessary only to consider what it means as a practical matter to oblige unions to combat employer discrimination. As we have discussed, the relationship of unions and employers is that of opposing autonomous entities. In the absence of a collective bargaining agreement, "[m]anagement hires and fires, pays and promotes, supervises and plans. All these are part of its function . . . ." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 583 (1960). A union can affect management's conduct in running the business only to the extent that the union can secure collective bargaining agreements that limit these managerial powers. Thus, a union cannot prevent employer discrimination in violation of Title VII unless the union negotiates for contract provisions that would prohibit management from engaging in practices that violate that law. And, a union that succeeds in obtaining any such contract provisions may thereafter have to expend its resources in the grievance/arbitration procedure in order to achieve any meaningful results.

The interpretation of Title VII advanced by the courts below, therefore, would inject into the process of private collective bargaining governmental compulsion as to the substantive result to be reached, by imposing on each union an affirmative duty to obtain contractual anti-discrimination provisions. Because such "contractual rights and remedies against discrimination"—like any other contractual right that a union secures—"must result from other concessions already made by the union as part of the economic bargain struck with the employer," *Alexander v. Gardner-Denver Co.*, 415 U.S. at 52, the duty the courts below have read into Title VII would effectively fix bargaining priorities for unions. Under the decision below, unions would be compelled to subordinate other bargaining aims to the goal of securing contractual provisions that *duplicate* the protections already conferred by Title VII, and then to spend scarce resources processing grievances that, if successful, will only *replicate* remedies that are available to the affected employees under Title VII. This result would obtain regardless of the other pressing problems that a represented group of employees may face—problems as to which there is no direct statutory protection and as to which the employee group thus is *wholly dependent* upon whatever contractual rights the group can obtain by dint of its collective strength. And the duty created by the court below exists regardless of a union's bargaining strength or *weakness*.

Imposing such a duty on unions would be directly at odds with the basic premise of the system of private collective bargaining established by federal law: that the substance of bargaining is to be left to the parties free from any governmental compulsion. See page 37, *supra*. Governmental imposition such as that required by the standard of union liability adopted below can only destabilize collective-bargaining relationships and interfere with the parties' ability to reach agreements reflecting their needs and desires without resort to economic wel-

fare. Such a requirement thus would defeat the overall aim of the national labor policy: enabling employers and employees "to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife." *Teamsters Union v. Oliver*, 358 U.S. at 295.[35]

The destabilizing effect of injecting required union enforcement of Title VII rights into the collective bargaining process is exacerbated by the inherent vagueness of the contours of the affirmative duty that unions are supposed to undertake. In this case, for example, the record is undisputed, and the district court indeed found, that the unions had challenged the discriminatory practices of the employer. But the courts below found that the unions did not adopt the mode of challenge that the courts believed would have been the most efficacious. Thus, the district court found the unions liable: for challenging the employer's tests on the basis of the contractual job-relatedness requirement rather than on a disparate impact theory (Pet. App. 137a); for failing to assert arguments as to the meaning of the contract that the court, but not the union, believed might be successful before an arbitrator (Pet. App. 137a, 139a);[36]

---

[35] Employment discrimination is not the only subject on which individual members seek to dictate unions' priorities through the mechanism of private law suits. For example, in a growing number of cases, employees who have been injured at work have sought to impose liability on their unions for failing to detect or eliminate the hazard that caused the injury. This Court has before it now a case raising the question whether such suits, though otherwise authorized by state law, are preempted by the NLRA. *Electrical Workers v. Hechler*, No. 85-1360 (argued January 20, 1987).

[36] On the issue of probationary discharges, the district court concluded that the general non-discrimination clause, which had been in the contract since 1965, had always protected probationary employees from racially discriminatory discharges. (Pet. App. 137a.) The undisputed testimony of the union's chief negotiator,

and for deciding that the best way to win relief for a black grievant denied a promotion was to base a grievance simply on seniority grounds instead of trying to prove race discrimination (Pet. App. 138a). For liability to turn on such judicial second-guessing is to deny the "union discretion [that] is essential to the proper functioning of the collective-bargaining system," *Electrical Workers v. Foust*, 442 U.S. 42, 51 (1979), as well as the "wide range of reasonableness [that] must be allowed a statutory bargaining representative in serving the unit it represents." *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

3. Title VII was not enacted in a vacuum, but against the backdrop of the system of collective bargaining established by the NLRA. There is not the slightest indication that Title VII was meant to alter that system. To the contrary, this Court has stated that the

---

however, was that the 1974 addition of a specific contract clause prohibiting such discriminatory discharges was understood as a contract "change" and an "improvement" (I JA 268-69, 273.) The unions thus plainly understood that without this "improvement," the contract contained no provision that protected probationary employees from discriminatory discharges. (*Id.*; see page 14 & note 15, *supra.*)

On the issue of initial assignments, the district court faulted the unions for not having advanced a "rather obvious" contract interpretation that had not even been urged by plaintiffs' counsel—namely, that although the contractual non-discrimination clause would not be violated by a discriminatory initial assignment, it would be violated on the employee's second day at work (and every subsequent day) when the employer required him "to continue to work" in the job to which he had been discriminatorily assigned. (Pet. App. 139a.) This finding ignores the undisputed testimony (again of the union's chief negotiator), that the union and the industry both understood that the language to which the industry had agreed in the non-discrimination clause had no application to initial assignments. (I JA 267-68; see page 16, *supra.*) Given that mutual understanding, it is hardly surprising that the unions failed to file grievances based on some variant of a "continuing violation" theory. (See note 20, *supra.*)

congressional policy of eliminating discrimination "cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA." *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 69 (1975).[37] *See also TWA v. Hardison*, 432 U.S. 63, 79 (1977). At a minimum, Title VII should not be read affirmatively to burden the role of unions in the collective bargaining process without clear and express words calling for such a result. And as we have seen, the words of § 703(c)(3) call for no such infringement upon the collective bargaining system.

In fact, the category of cases in which a union has merely failed to make affirmative efforts—or sufficiently energetic efforts—to prevent employer discrimination would seem to be the last one in which the national labor policy should be deemed to have been compromised by the enactment of Title VII. Congress enacted Title VII for the very purpose of creating rights that would be independent of "majoritarian processes"; indeed, to make Title VII rights dependent upon the outcome of collective bargaining "would defeat the paramount congressional purpose behind Title VII." *Alexander v. Gardner-Denver Co.*, *supra*, 415 U.S. at 51. Title VII confers on *each* employee, as an individual, an *indefeasible* right to be free from employment discrimination. And Title VII both establishes a procedure by which any employee may

---

[37] The court of appeals' decision that this Court reviewed in *Emporium Capwell* was a District of Columbia Circuit decision, rendered shortly after *Macklin*, *supra*. The court of appeals held, in the context of construing employees' rights under § 7 of the NLRA, that unions were required to meet the "high standard" of "remedying [employer] discrimination to the *fullest extent possible, by the most expedient and efficacious means.*" *Western Addition Community Org. v. NLRB*, 158 U.S. App. D.C. 138, 485 F.2d 917, 931 (D.C. Cir. 1973) (emphasis in original). The court of appeals held that if a union fell short of this standard, minority employees were entitled to engage in their own concerted activity in an effort to bargain directly with the employer. *Id.* This court reversed, for the reason described in the text above.

enforce that statutory right and also creates a public agency, the Equal Employment Opportunity Commission, which "is empowered . . . to prevent any person from engaging in any unlawful practice," 42 U.S.C. § 2000e-5(a).

It is thus apparent that Congress did not commission labor unions, which are majoritarian organizations, to serve as Congress' agents in enforcing against employers the individual rights created by Title VII. Nothing in Title VII justifies impairing the national policy of free collective bargaining, which is precisely what the decision below would do.

II. SECTION 1981 DOES NOT PLACE UPON UNIONS AN AFFIRMATIVE DUTY TO COMBAT EMPLOYER DISCRIMINATION

Section 1981 provides that all persons in the United States "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ." These words, on their face, provide no basis for holding a union liable for discriminatory conduct of an employer. And, this Court's construction of these words in *General Building Contractors Ass'n v. Pennsylvania*, *supra*, leaves no room for such a theory of liability.

In *General Building Contractors* a group of employers agreed to hire only persons referred by a union-operated hiring hall. The union, acting on its own, was found to have discriminated against blacks in its referrals. No claim was made that the employers were guilty of discrimination, but the lower court held the employers liable for the *union's* discrimination, concluding, in effect, that the employers had "a 'duty to see that discrimination does not take place in the selection of [their] workforce,' regardless of where the discrimination originates." 458 U.S. at 392. This Court reversed.

The Court first held "that § 1981 . . . can be violated only by purposeful discrimination." *Id.* at 391. The Court

then measured against that standard the conclusion of the lower courts in that case that the employers had an "affirmative obligation to ensure the protection of" the plaintiffs from discrimination by the union. *Id.* Thus, that case, like the instant case, involved an asserted affirmative duty of one party to prevent discrimination by another party. There the asserted affirmative duty was sought to be derived from the employers' "nondelegable" responsibility for the selection of their workforces; here the asserted affirmative duty is sought to be derived from the unions' status as exclusive bargaining representative. Though the purported source of the duty is different, this Court's analysis of whether § 1981 imposes such a duty is equally applicable here:

> [In] this litigation the question is not whether the employers and associations are free to delegate their duty to abide by § 1981, for whatever duty the statute imposes, they are bound to adhere to it. The question is *what* duty does § 1981 impose. More precisely, does § 1981 impose a duty to refrain from intentionally denying blacks the right to contract on the same basis as whites or does it impose an affirmative obligation to ensure that blacks enjoy such a right? The language of the statute does not speak in terms of duties. It merely declares specific rights held by "[a]ll persons within the jurisdiction of the United States." We are confident that the Thirty-ninth Congress meant to do no more than prohibit the employers and associations in these cases from intentionally depriving black workers of the rights enumerated in the statute, including the equal right to contract. It did not intend to make them the guarantors of the workers' rights as against third parties who would infringe them. [*Id.* at 396, emphasis in original.]

The Court went on to add, again in words that apply here as well, the following:

> Our earlier holding that § 1981 reaches only intentional discrimination virtually compels this con-

> clusion. It would be anomalous to hold that § 1981 could be violated only by intentional discrimination and then to find this requirement satisfied by proof that the individual plaintiffs did not enjoy "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens" and that the defendants merely failed to ensure that the plaintiffs enjoyed employment opportunities equivalent to that of whites. [*Id.* at 396-397.]

The decision below cannot be reconciled with these principles. The courts below held that unions are liable under § 1981 for failing to make affirmative efforts to stop the *employer's* discrimination. They held that this liability exists " 'regardless of' [the union] leadership's favorable disposition toward blacks." (Pet. App. 25a). The courts below did not find that the unions' actions were racially motivated or that the unions treated black and white employees differently. Instead, the lower courts held that § 1981's requirement of intentional *discrimination* was satisfied by a finding that the unions made intentional *decisions* not to assert arguments of racial discrimination in grievances. (Pet. App. 26a). But an intentional *decision* not to make affirmative efforts to stop another's discrimination does not, and cannot, substitute for what this Court required in *General Building Contractors*: it does not constitute either "purposeful discrimination" or "racially motivated" action. Where a statute imposes no duty to act, a deliberate decision not to act is not a statutory violation, so long as that decision is not motivated by unlawful considerations.

The conclusion that § 1981 does not impose an affirmative duty on unions to combat employer discrimination is also compelled by the considerations of federal labor law and policy described in part I B of this brief. In *General Building Contractors Assn.*, this Court recognized that unions and employers are autonomous entities in an adversarial setting, each with the "power to oppose" the other, but neither with the "right to control" the other.

458 U.S. at 393-394. The structure and procedure on which the relationship of these parties is founded is established by the NLRA. And, as we already have discussed at length, it is inconsistent with the system of collective bargaining thus established for government to impose upon unions a duty to pursue any particular substantive result. From the set of legitimate union objectives, the priorities of unions are to be set solely by the members, pursuant to their own system of governance, and not by government compulsion. Section 1981, enacted in the aftermath of the Civil War, should not now be read to override these basic precepts of national labor law.

CONCLUSION

For the foregoing reasons, the decision and judgment of the court of appeals should be reversed.

Respectfully submitted,

BERNARD KLEIMAN
One East Wacker Drive
Chicago, Illinois 60601

CARL FRANKEL
Five Gateway Center
Pittsburgh, PA 15222

ROBERT M. WEINBERG
JULIA PENNY CLARK
MICHAEL H. GOTTESMAN *
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340

LAURENCE GOLD
DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioners

* Counsel of Record